No. 75-1686

In the Supreme Court of the United States

OCTOBER TERM, 1976

LODGES 743 AND 1746,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

MARION GRIFFIN,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

CITATIONS

Cases:

Page

Cases (continued):

Page

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1686

LODGES 743 AND 1746,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-82a) is reported at 534 F. 2d 422. The Board's decision and order (Pet. App. 209a-247a) are reported at 192 NLRB 382. The decision of the district court (Pet. App. 83a-197a), in a companion proceeding, is reported at 299 F. Supp. 877.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1975 (Pet. App. 1a). On December 22, 1975, the court of appeals denied the unions' petition for rehearing and suggestion for rehearing in banc (Pet. App. 483a-484a). By order dated March 11, 1976 (Pet. App.

485a), Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 20, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly held that economic strikers were not entitled to a preference in reinstatement after expiration of the 4-1/2 month preferential hiring period provided in a strike settlement agreement between the company and the union.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), and of the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. 141, *et seq.*) are set forth in Appendix A of the petition in No. 75-1729, a companion case.

STATEMENT

A. Introduction

The opinion of the court of appeals covers two related cases, which were argued together (Pet. App. 5a-7a). In the instant case, No. 75-1686, petitioners challenge parts of the decision below that relate to review of an order of the National Labor Relations Board in an unfair labor practice proceeding (Pet. App. 45a-66a, 216a-219a). In No. 75-1729, petitioners challenge parts of the decision below that relate to an appeal from the district court in a suit for violation of collective bargaining agreements under Section 301 of the Labor Management Relations Act (Pet. App. 7a-45a, 83a-197a). The factual background of both cases is the same. In the Section 301 proceeding, the district court

dismissed, for the most part, petitioners' claims that United Aircraft Corporation ("the Company") breached a strike settlement agreement by failing to reinstate certain strikers. In the unfair labor proceeding, the Board, adopting the findings of the district court as well as those of the trial examiner (Pet. App. 60a-61a, 218a), dismissed, for the most part, petitioners' charges that the Company's failure to reinstate the strikers violated the National Labor Relations Act.

B. The Board's Findings of Fact

On June 8, 1960, petitioners ("the Union") launched a major economic strike against the Company at four plants in Connecticut (Pet. App. 4a). The strike lasted nine weeks and was marked by extreme violence and mutual antipathy (*ibid.*). In August 1960, the parties agreed to settle the strike (Pet. App. 90a-92a, 331a). The strike settlement consisted of three parts: (1) new collective bargaining agreements for the four plants; (2) an agreement to submit to arbitration the cases of 50 strikers accused of serious strike misconduct; and (3) striker recall agreements (hereafter "the recall agreement") establishing a procedure to govern the recall of strikers at the four plants (Pet. App. 4a-5a, 100a, 331a).

Under the recall agreement, strikers who registered for reinstatement were to be recalled in three phases (Pet. App. 8a-9a).[1] Under Phase 1, strikers whose pre-strike jobs were available at the end of the strike were to be reinstated to those jobs (Pet. App. 9a). If a striker's pre-strike job was not available, he was to be recalled, under Phase 2, to certain other defined jobs for which he was qualified (*ibid.*). Finally, strikers for whom no

---

[1]The language of the recall agreement for plants in the Company's Hamilton Standard Division differed slightly from that for plants in its Pratt & Whitney Division (Pet. App. 8a-9a, n. 3).

jobs were available under Phase 1 or Phase 2 were to be placed on a preferential hiring list for recall to job openings which "develop at any time prior to January 1, 1961 before new employees are hired" (Pet. App. 8a-9a, n. 3).

Some 6,500 strikers registered for reinstatement and some 4,500 of these strikers were reinstated from the inception of the agreement in August 1960 until expiration of the preferential hiring period on December 31, 1960 (Pet. App. 10a, 126a-127a, 128a-129a).[2] Other registered strikers resigned, retired, died, or were discharged for strike violence pursuant to the arbitration agreement (Pet. App. 10a, 127a, 129a). In addition, some registrants failed a job physical and some refused offers of recall (*ibid.*). When the recall agreement expired at the end of 1960, there were 1,562 registered strikers remaining on the preferential hiring list who had not been recalled (Pet. App. 10a).[3]

The Company administered the striker recall agreement in good faith and did not artificially depress the employee complements during the 4-1/2 months in which strikers were accorded preferential hiring rights to available jobs under the agreements (Pet. App. 14a, 17a-25a, 57a, 130a-

[2]More than 3,000 registered strikers were reinstated to their previous jobs under Phase 1, approximately 900 were recalled to similar jobs under Phase 2, and 630 were recalled from the preferential hiring list under Phase 3 (Pet. App. 10a).

[3]In response to a request by Union negotiators in pre-settlement discussions for an estimate of the number of strikers who would not be returned to work, the Company's Vice President for Industrial Relations, Martin F. Burke, made a rough estimate that between 400 and 500 strikers at Hamilton Standard would have no jobs at the end of the strike (Pet. App. 15a, 91a). At Pratt & Whitney, Burke estimated that the number would be larger (*ibid.*). But Burke also repeatedly stressed that it was very difficult to make any estimate (Pet. App. 15a, n. 5).

149a, 217a-218a).[4] Some of the registered strikers were not recalled under the agreement because their jobs were filled by permanent replacements hired during the strike (Pet. App. 47a-48a); other registered strikers were not recalled because the employee complement was depressed as the result of the post-strike production problems and business exigencies (Pet. App. 13a, 18a-25a, 130a-148a).[5]

After the expiration of the recall agreement on December 31, 1960, the Company wrote the strikers who had not been reached for recall, inviting them to apply for employment as new employees, and about 1,200 responded (Pet. App. 127a-129a). The Company, in early 1961, hired 450 of these applicants (Pet. App. 58a).[6]

C. The Board's Decision

The Board, with two Members dissenting, concluded that, although it was not bound by any private agree-

[4]The Board found that the evidence submitted by the General Counsel and the Union regarding the depression of the employee complement below pre-strike levels "provided at most a *prima facie* showing of a violation," which the Company answered by showing legitimate business reasons for the depression (Pet. App. 219a). The Union and the General Counsel then failed to sustain their burden of overcoming the Company's answer (*ibid.*).

[5]As the court below found, strike-related production problems were expressly within the contemplation of the parties when they negotiated the striker recall agreement, although they could not foresee the extent and duration of the reduced complements. Thus, the recall agreement was made under the assumption that business considerations might prevent reinstatement of some strikers, albeit temporarily. In short, it was contemplated that some strikers' jobs would not be "available" within the meaning of the agreement (Pet. App. 16a-17a).

[6]The Company hired proportionally more striker applicants than it hired non-striker applicants. During the same period, in which it hired 450 out of 1,200 striker applicants, it hired 1,593 out of 17,000 non-striker applicants at Pratt & Whitney (Pet. App. 128a), and 382 new employees from among several thousand applicants at Hamilton Standard (Pet. App. 129a, n. 12).

ment "waiving" rights guaranteed by the Act, the statutory policy of encouraging the practice and procedure of collective bargaining would be furthered by giving effect to the limitation on the strikers' reinstatement rights adopted by the parties in their strike settlement agreement here. Accordingly, the Board held that the Company did not violate Section 8(a)(3) and (1) of the Act by denying the strikers, in conformity with the terms of the recall agreement, preferential hiring rights, and treating them as applicants for new employment, after December 31, 1960 (Pet. App. 221a-229a).[7]

The Board rejected the view of the trial examiner (Pet. App. 404a-405a) that the Board's 1968 decision in *Laidlaw Corp.*, 171 NLRB 1366, enforced, 414 F. 2d 99 (C.A. 7), certiorari denied, 397 U.S. 920, should override the recall agreement. There, the Board, applying the principles enunciated in *National Labor Relations Board v. Fleetwood Trailer Co.*, 389 U.S. 375, reversing 366 F. 2d 126 (C.A. 9),[8] held that an economic striker does not lose his right to reinstatement merely because a permanent replacement is in his job when he initially applies

[7]The Board also adopted the trial examiner's finding that the Company did not otherwise discriminate against those strikers not rehired by December 31, 1960, when they reapplied for employment (Pet. App. 57a-58a, 210a, 405a). However, in the Section 301 proceeding, the district court found that the Company had violated the recall agreement, in some instances, by transferring and promoting junior employees into jobs which the strikers could have filled. 299 F. Supp. at 918-924. The Board adopted the trial examiner's finding that this conduct also constituted violations of Section 8(a)(3) of the Act (Pet. App. 219a).

[8]In *Fleetwood*, the Court held that an economic striker retains his status as an employee under Section 2(3) of the Act, 29 U.S.C. 152(3), until he obtains regular or substantially equivalent employment. Thus, a striker whose job is not available when he initially applies, because of a temporary decline in production, is entitled to reinstatement when the job subsequently opens up. 389 U.S. at 380-381.

for work; in the absence of a legitimate and substantial business justification, the employer is obligated to reinstate him should an appropriate job subsequently become available.

Neither *Fleetwood* nor *Laidlaw*, however, concerned a strike settlement agreement. In declining to apply *Laidlaw* and in giving effect to the recall agreement, the Board relied on the following factors (Pet. App. 225a-226a): (1) the agreement was the result of good faith collective bargaining; (2) the Union's negotiators were top officials of the Union who were experienced, competent, and knowledgeable; (3) the Company had made concessions on disputed issues in order to reach agreement, which it might not have been willing to make if it had known that the Union would repudiate part of the agreement, and the Union had not only accepted the agreement's benefits but was suing to enforce the agreement under Section 301; (4) the Company acted in good faith in entering into and administering the recall agreement; and (5) the agreement did not constitute an attempt to undermine the Union since the Company contemporaneously signed a new collective bargaining contract with the Union.

The Board added (Pet. App. 226a-228a):

> Moreover, *Laidlaw* was not decided until 1968. At the time the recall agreement was signed in 1960, the prevalent rule could reasonably have been regarded as having been that an economic striker's right to full reinstatement was determined as of the time that he made his application for reinstatement, and if no vacancy then existed, the employer was not required to place his name on a preferred hiring list.[9] Thus in agreeing to give strikers for whom

[9]The Board cited *"Brown and Root, Inc.*, 132 NLRB 486 (1961, enfd. 311 F. 2d 447 (C.A. 8); *Atlas Storage Division*, 112 NLRB 1175,

jobs were not immediately available preferred hiring status for approximately 4-1/2 months after termination of the strike, [the Company] gave them reinstatement rights which exceeded the requirements of the law as it was then understood.

D. The Court of Appeals' Decision

The court of appeals sustained the Board's conclusion that the Company did not violate Section 8(a)(3) and (1) of the Act by denying reinstatement to strikers after expiration of the preferential hiring period under the recall agreement, but found it unnecessary to determine whether a union may waive striker reinstatement rights by contract (Pet. App. 52a-57a). In the court's view, at the time the parties entered into the agreement in 1960, the state of the law was such that the Union could not have knowingly waived the statutory right to reinstatement ultimately accorded strikers under *Fleetwood* and *Laidlaw*, *supra* (Pet. App. 52a-54a). Moreover, the court found that "the Union was under the impression that the principal reason that strikers would not be reinstated immediately was that they had been permanently replaced"; thus, "the issue of temporary job unavailability beyond the expiration of the Agreements was not a consideration" (Pet. App. 54a-55a).

1180 (1955), enfd. *sub nom. Chauffeurs, Teamsters, and Helpers "General" Local No. 200 AFL*, 223 F. 2d 233 (C.A. 7); *Bartlett-Collins Company*, 110 NLRB 395, 397-398 (1954), enfd. *sub nom. American Flint Glass Workers' Union* v. *N.L.R.B.*, 230 F. 2d 212 (C.A. D.C.) cert. denied 351 U.S. 988." It noted that these cases were "specifically overruled in *Laidlaw*" (Pet. App. 226a-227a, n. 31).

The Board also noted (Pet. App. 227a, n. 31) that, at the time of the parties' agreement in 1960, "there was specific precedent for the validity of the recall agreement" in a case decided two years before *Wooster Division of Borg-Warner Corp.*, 121 NLRB 1492, 1495.

In the court's view, the fundamental question was whether "Fleetwood and Laidlaw should be applied retroactively to 1960" (Pet. App. 55a). The court concluded that, because those decisions "imposed duties on employers which had not [theretofor] existed, it would be unjust to use those cases to impose liability [on the Company] fifteen years after the events at issue transpired" (Pet. App. 56a-57a).[10] The court noted that the Company had acted in good faith, that the Union had the benefit of experienced labor counsel throughout the strike settlement process, and that the rights granted strikers under the striker recall agreement exceeded the requirements of then existing law (Pet. App. 57a). Under these circumstances, the court held, "we are not at this stage disposed to permit imposition of a substantial liability upon the Company" (*ibid.*).

The court further concluded that substantial evidence supported the Board's adoption of the trial examiner's finding that the Company did not discriminate against strikers as applicants for employment after expiration of the striker recall agreement (Pet. App. 57a-58a). But it set aside and remanded for additional proceedings

---

[10]The court stated (Pet. App. 55a-56a):

> * * * *Laidlaw* expressly overturned a well-established rule existing in 1960 that the reinstatement rights of permanently relaced strikers were determined at the time of application for re-employment. *Fleetwood* was not so abrupt a departure from precedent as *Laidlaw* in that the Board had not spoken to the precise issue presented in *Fleetwood*. But a reasonable reading of decisions existing in 1960, particularly *Atlas Storage Division*, *supra*, would be that the same rule applied to strikers whose jobs were temporarily unavailable at the close of the strike.

See also Pet. App. 54a: "*Fleetwood*, like *Laidlaw*, * * * established rights not existing in 1960," when the parties entered into the strike settlement agreement.

the Board's Section 8(a)(3) findings which had been predicated on the district court's breach of contract findings (see n. 7, *supra*).[11]

ARGUMENT

1. The Board found that in the strike settlement agreement the Company and the Union agreed, as part of a bargain on multiple issues, that the strikers' entitlement to a preference for jobs would extend through December 31, 1960, but not longer. In concluding that this bargain was valid, the Board relied on a number of factors: (a) the agreement was the result of good faith collective bargaining; (b) the Union's negotiators were experienced and competent labor counsel; (c) the Company acted in good faith in entering into and administering the agreement; (d) the agreement was fair and reasonable in according strikers preferential hiring rights for 4-1/2 months; and (e) at the time the agreement was entered into, "the prevalent rule could reasonably have been regarded as having been that an economic striker's right to full reinstatement was determined as of the time that he made his application for reinstatement, and if no vacancy then existed, the employer was not required to place his name on a preferred hiring list" (*supra*, p. 7).

---

[11] In the Section 301 case, the court remanded to the district court, for proceedings consistent with its opinion, issues relating to the Company's promotions and transfers during the term of the recall agreement (Pet. App. 25a-38a). In the instant unfair labor practice case, the court directed the Board to make "an independent legal assessment" of whether the Company's handling of transfers and promotions violated the National Labor Relations Act (Pet. App. 64a). The court also directed the Board to determine independently whether the Company had engaged in unlawful discrimination by reinstating all non-strikers who were absent from work during the strike while at the same time denying reinstatement to some strikers (Pet. App. 65a-66a, n. 60).

The court below, finding that the right of an economic striker to a preference for jobs which become available after his initial application for reinstatement was not established until the decisions in *Fleetwood* and *Laidlaw*, *supra* (decided in 1967 and 1968, respectively), held that the parties could not have bargained away rights which they did not know existed.[12] However, the court, after considering the same factors which the Board had, concluded that it would be inequitable in this case to apply *Fleetwood* and *Laidlaw* retroactively, and thus the court sustained the Board's ultimate conclusion that the Company did not violate Section 8(a)(3) and (1) of the Act by declining to accord the strikers a preference in hiring after December 31, 1960 (*supra*, pp. 8-9).

It is apparent that, despite different angles of attack, the underlying rationale of the decision of the court and the Board are the same, namely that, in the particular circumstances of this case, the settlement agreement, which was made in good faith and at arm's length, should not be set aside because of subsequent judicial illumination of the rights of the parties had they made no agreement. Since the Board and the court considered the same factors and reached the same ultimate conclusion, the fact that the court utilized a rationale different in some respects from the Board's, without first remanding the case to the Board, did not, as petitioners contend (Pet. 35-36), violate the precepts of *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80. Where, as here, it is clear that the agency

---

[12] If such rights did exist prior to *Fleetwood*, as petitioners argue (Pet. 23-27), the judgment below could still be supported on the ground that the Board properly concluded that the rights were limited by the strike settlement agreement. Accordingly, if this Court grants the petition for certiorari we reserve the right to support the judgment on the alternative ground that the decision of the Board was correct in its rationale.

would reach the same result as the court, a remand is not necessary, for "*Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766, 767 n. 6 (plurality opinion). Cf. *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 526-527 n. 14. For this reason, and because the propriety of upholding the agreement establishing and setting limits to the strikers' reinstatement preference turns on the unique facts of this case, the decision below presents no issue warranting review by this Court.

2. The decision below does not conflict with the cases cited by petitioners, which reject the "unsettled state of the law" as a defense for statutory violations allegedly undertaken in a good faith belief that the conduct was lawful (Pet. 17-21).[13] Those cases are factually distinguishable.[14] Moreover, it is apparent that the court below did not intend to disturb the settled distinction between " '[retroactive clarification of uncertain law] and retroactive change in clear law' " (Pet. 22, n. 12).

---

[13]See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-417; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 496; *United States* v. *United States Steel Corp.*, 520 F. 2d 1043, 1059 (C.A. 5), petitions for certiorari pending, Nos. 75-1475, 75-1478.

[14]In *Albemarle* and *United States Steel Corp., supra*, the employer and the union violated the "primary objective" of Title VII of the Civil Rights Act of 1964 by maintaining a seniority system which perpetuated the "barriers that have operated in the past to favor * * * white employees over other employees." *Albermarle, supra*, 422 U.S. at 417, quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430. The parties could not escape liability for remedying their violation of black employees' rights merely by showing an absence of "bad faith," for sustaining such a defense would "frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421. See also *United States Steel Corp., supra*, 520 F. 2d at 1059.

By contrast, the agreement between the Company and the Union in the present case was not unlawful but represented a good faith effort by the parties to define strikers' reinstatement rights through collective bargaining rather than through litigation. Moreover, the Union, with the aid of experienced legal counsel, was clearly seeking to enhance the reinstatement rights of strikers and the agreement could reasonably have been perceived to have that effect under the law as it existed at that time. In these circumstances, the Board reasonably concluded that, far from frustrating a central purpose of the Act, the parties' agreement served to promote the statutory policy of encouraging the settlement of industrial disputes through collective bargaining (Pet. App. 228a).

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra*, the question was whether the damage period for United's violation of the antitrust laws should be abated because of its alleged reliance on legal precedents which were subsequently overruled. The Court found "no occasion to pass upon [this] theory," since it found that there was no "clearly declared judicial doctrine upon which United relied." 392 U.S. at 496.

[15]Petitioners contend (Pet. 28-29) that there was no evidence or finding that the Company "significantly relied upon" the prior state of the law. However, where, as here, the parties have entered into a settlement agreement, defining striker reinstatement rights, the employer certainly relies on that agreement as establishing the extent of his obligation to seek out and offer reinstatement to strikers. In this context, it is the Company's action in conformity with the settlement agreement that supplies the element of good faith reliance.

Thus, the court's opinion reflects (Pet. App. 55a) that the court applied the retroactivity principles enunciated in *Retail, Wholesale and Department Store Union* v. *National Labor Relations Board*, 466 F. 2d 380, 390 (C.A. D.C.) (Pet. 22), which gives retroactivity to a clarification but not to a change in clear law.[15] The

opinion further reflects (*supra*, p. 9, and n. 10) that the court viewed *Fleetwood* and *Laidlaw* (at least in combination) as "overruling" decisions, rather than as decisions which merely clarified "previously unsettled law" (Pet. 21).[16]

Accordingly, the issue boils down to whether the court below was correct in concluding that "*Fleetwood*, like *Laidlaw*, * * * established rights not existing in 1960" (Pet. App. 54a). This question, which turns on an interpretation of past Board decisions and which, because of the passage of time since *Fleetwood*, is unlikely to have significance beyond this particular case, does not warrant review by this Court. In any event, the court below had adequate support for its conclusion that, although "*Fleetwood* was not so abrupt a departure from precedent as *Laidlaw*," a reasonable reading of the decisions existing in 1960 could have led to the view that temporarily displaced, like permanently replaced, strikers were not entitled to preferential hiring rights if no jobs were available when they applied for work at the end of the strike (Pet. App. 55a-56a).[17]

---

[16]This is confirmed by the fact that the court noted that in *H. & F. Binch Co. Plant of Native Laces* v. *National Labor Relations Board*, 456 F. 2d 357, 365 (C.A. 2), it had upheld a Board order applying *Laidlaw* retroactively. It explained that the "failure to reinstate in *Binch* had occurred after the Supreme Court's decision in *Fleetwood*," which " 'should have demonstrated the erosion of employe[r]s' freedom in treating jobless economic strikers as new applicants' * * *" (Pet. App. 57a, n. 49). Cf. *Retail, Wholesale and Department Store Union, supra* (Pet. 22, 28), declining to apply *Laidlaw* to events occurring prior to *Fleetwood*.

[17]Petitioners contest (Pet. 23-27) the court's reliance on *Atlas Storage Division*, 112 NLRB 1175, 1179-1180, enforced *sub nom. Chauffeurs, Teamsters & Helpers "General" Local No. 200* v. *National Labor Relations Board*, 233 F. 2d 233 (C.A. 7). According to petitioners, *Atlas* involved the permanent abolition or absorption

3. Petitioners contend that the Board and the court of appeals erroneously failed to place the burden on the Company of proving justification for not restoring full production, and reinstating all the strikers, prior to expiration of the recall agreement (Pet. 33-35). But, as the court noted, the Board "found that the Company had * * * rebutted the *prima facie* case of discrimination" and "the Union and General Counsel then failed to overcome that answer" (Pet. App. 61a, n. 56, 218a-219a). "Thus, the preponderance of the evidence remained on the side of the Company" (Pet. App. 61a, n. 56). By contrast, "[t]he employer in *Fleetwood* had presented no evidence in justification" (Pet. App. 61a-62a, n. 56).

---

of a striker's job and thus could not have been read as suggesting that strikers for whom jobs were only temporarily unavailable would also lose their reinstatement rights (Pet. 24, 25, n. 15). However, in *Atlas*, although the employer had lost business so that the striker's job had been abolished or absorbed by other employees at the time he applied for work, a vacancy occurred three days later when one of the employees was injured and had to be replaced (112 NLRB at 1180, n. 15). Nonetheless, the Board concluded that, since no job was available on the date the striker applied, he lost his right to reinstatement and the employer was free to hire someone else to fill the job (*ibid.*). Moreover, in *Fleetwood*, the Ninth Circuit relied on *Atlas* in concluding that "the right of * * * strikers to jobs must be judged as of the date when they apply for reinstatement," and that, if there are "no jobs available on that date," the employer does "not commit * * * an unfair labor practice by failing to reemploy them." 366 F. 2d at 128-130, reversed, 389 U.S. 375. Following this Court's reversal of the Ninth Circuit's decision, the Board in *Laidlaw, supra*, 171 NLRB at 1370, expressly overruled *Atlas*. See also Pet. App. 226a-227a, n. 31.

Cases cited by petitioners for the proposition that the Board has "consistently distinguished between temporary and permanent complement depression" (Pet. 25, n. 16) are inapposite, for they turn on whether strikers have a reasonable expectancy of reemployment and, therefore, a right to vote in a representation election. A similar rule is applied with respect to laid off employees who have no statutory right to reinstatement. See, *e.g.*, *National Labor Relations Board* v. *Jesse Jones Sausage Co.*, 309 F. 2d 664, 665-666 (C.A. 4).

4. Finally, petitioners contend (Pet. 37-40) that the Board did not adequately articulate the reasons for each aspect of its decision. But the length of the case and the number of contentions raised by the parties necessitated that some contentions be given relatively condensed or abbreviated treatment.[18] The court of appeals properly concluded that the Board had not failed to make a finding on the Unions' contention that those strikers not rehired by December 31, 1960, were subsequently discriminated against when they reapplied for employment. As the court noted, the trial examiner, whose decision the Board adopted in relevant part, found no pattern of discrimination against strikers as new job applicants and that finding is supported by substantial evidence (Pet. App. 57a-58a). Moreover, since the Company hired a larger proportion of striker applicants than of non-striker applicants and since the General Counsel and the Union failed to offer any evidence of individual discrimination, no extended discussion was required in rejecting the contention that former strikers are *per se* more qualified as new job applicants than are non-strikers.[19]

---

[18]In the proceeding before the Board there were more than 30,000 pages of testimony and hundreds of exhibits. In the Section 301 record, which the Board independently reviewed, there were about 10,000 pages of testimony and, again, hundreds of exhibits. The parties filed exhaustive briefs and raised many issues which have now dropped out of the case but which required discussion by the Board or the trial examiner. For example, there were numerous allegations that the Company violated Section 8(a)(1) and (5) of the Act and numerous procedural contentions by all parties (see, *e.g.*, Pet. App. 201a-216a, 229a-235a, 350a-402a, 416a-473a).

[19]Cases cited by petitioners on this point (Pet. 38-39) are distinguishable. In *Laidlaw*, *supra*, 171 NLRB at 1367, 1386-1387, and *Laher Spring and Electric Car Corp.*, 192 NLRB 464, 465-466, there was specific evidence of antiunion motivation in the employer's failure to reinstate strikers. In *Fire Alert Co.*, 207 NLRB 885, 886, the strikers were entitled to reinstatement, not merely to nondiscriminatory consideration as applicants for new employment.

Similarly, the Board adequately articulated its reasons for adopting the district court's findings that the temporary depression of the employee complement was not illegally motivated in this case (Pet. App. 218a-219a, 130a-149a), and for making a contrary finding on the facts presented in *Laher Spring*, *supra* (see 192 NLRB at 465-466).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

MARION GRIFFIN,
Attorney,
National Labor Relations Board.

JULY 1976.

DOJ-1976-07